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No. 84-1379

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, LTD., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A RESPONSE TO APPELLEES' CITATION OF NEW AUTHORITY

DENNIS J. HORAN
EDWARD R. GRANT
*MAURA K. QUINLAN
Americans United for Life
Legal Defense Fund
343 S. Dearborn St. #1804
Chicago, Ill. 60604
312-786-9494
Counsel for Appellants
*Counsel of Record

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MOTION FOR LEAVE TO FILE A RESPONSE TO
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Appellants Eugene F. Diamond and Jasper F. Williams, by their attorneys, respectfully move this Court for leave to submit a supplemental brief in response

to appellees' Supplemental Brief citing new authority. In support of this motion, appellants state:

1. Appellees seek leave to respond to the analysis of this Court's opinion in Bender v. Williamsport Area School Dist., No. 84-773 (Date of Opinion, March 25, 1986) that is presented in the Supplemental Brief of appellees. The appellees contend that under Bender, the appeal in this case should be dismissed. Appellants wish to respond to this contention.

2. Appellants also seek to respond to appellees' characterization of the proceedings in the district court on the issue of attorneys' fees. By edited quotation of a sentence in the opinion of the district court, appellees have created the inaccurate impression that the conduct of the appellants during the

course of this litigation may have amounted to bad faith and thus created a separate basis for the award of attorneys' fees.

WHEREFORE, appellants respectfully request this Court for leave to file this Supplemental Brief in response to appellants' citation of new authority and supplemental brief.

Respectfully submitted,

Dennis J. Horan
Edward R. Grant
*Maura K. Quinlan

AUL Legal Defense Fund
343 S. Dearborn St.
Room 1804
Chicago, Ill. 60604
(312) 786-9494

Counsel for Appellants
*Counsel of Record

April 4, 1986

TABLE OF AUTHORITIES

Bender v. Williamsport Area School District, No. 84-773 (Slip opinion, dated March 25, 1986.
. . . . . passim

Charles v. Daley, No. 79 C 4541 and 4548, N.D. Ill. (Memorandum Opinion, April 22, 1985).
. 7

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SUPPLEMENTAL BRIEF IN RESPONSE TO
APPELLEES' CITATION OF NEW AUTHORITY

Contrary to the arguments set forth in the appellees' citation of new authority, the decision of this Court in Bender v. Williamsport Area School District, No. 84-773, (Opinion Date:

March 25, 1986) does not support the dismissal of this case for lack of jurisdiction under Article III of the Constitution. Bender is clearly distinguishable from the situation in the case at hand. A brief review of the salient points of the Bender decision demonstrates that this Court is well aware of those distinctions.

Bender involved an appeal from an adverse district court opinion by a lone dissenting member of the Williamsport School Board, Mr. Youngman. Although the suit was brought against Mr. Youngman in both his official and personal capacities, this Court noted that there is nothing in the record or the district court judgment "to support the suggestion that relief was sought against any School Board member in his or her individual capacity. Slip op. at 8. This Court

also held that Mr. Youngman, as the lone dissenting vote in the School Board's decision not to appeal, could not "step into the shoes of the Board" and invoke its right to appeal. Slip op. at 9.

Finally, this Court rejected the contention that Mr. Youngman's status as an alleged "aggrieved parent" of a Williamsport High School student created a "case or controversy" sufficient for purposes of Article III. There was nothing in the record to support this asserted basis for jurisdiction, and Mr. Youngman had failed to file an appropriate motion to intervene pursuant to Fed. Rule Civ. Proc. 24. Slip. op. at 13-14.

The position of the appellants in this matter is easily distinguishable from that of Mr. Youngman. Unlike Mr. Youngman, Dr. Diamond and Dr. Williams

had, upon filing of a Rule 24 motion setting forth their specific interests in this case, been granted the status of intervening parties in their individual capacity. Their interests in the outcome of this case, therefore, had been a matter of record virtually from the commencement of this litigation. See, Motion to Intervene, reprinted in Brief of Plaintiffs-Appellees at SA1-SA11. These interests include their professional and economic interests in the enforcement of the statutory provisions at issue, as well as their standing to protect the rights of their potential patients: newborn infants who may survive abortion, and women who may be suffer emotional distress if they become aware that they have unwittingly been using abortifacient drugs or devices. There is no question here of a party attempting to convert his

official-capacity status to that of individual-capacity status without proper foundation. The appellants have been parties to this proceeding in their individual capacities for over six years.

The concurring opinion of Justice Marshall in Bender aptly characterizes the difference between the position of Dr. Diamond and Dr. Williams and that of Mr. Youngman. "I do not contest that Mr. Youngman could pursue this dispute on appeal had he intervened in the lawsuit in his capacity as a parent." Slip. op. at 16. In this case, Dr. Diamond and Dr. Williams have long since fulfilled the requirement of securing their status as parties through the filing of a successful motion for intervention. In the words of a district court opinion cited by the appellees in their supplemental brief, "the intervenors

chose to enter the suit in a position equal to that of the State defendants..." Supplemental Brief at 7. Accordingly, the intervenors' right to appeal in this matter is equal to that of any other party, and thus, this Court has jurisdiction over the intervenors' appeal.

Appellees, in their supplemental brief, have also discussed the question of whether the award of attorneys' fees against the appellants provides additional grounds for this Court's jurisdiction. Appellants, who have briefed this issue in their own supplemental brief dated March 18, 1986, desire only to clarify a citation of authority made by appellees.

On page 7 of their supplemental brief, appellees cite an edited portion of a paragraph from the opinion of the

district court on the issue of whether the appellants have conducted this litigation in bad faith. The edited citation fails to include that portion of the paragraph in which the court finds that the behavior of appellants apparently did not meet the standard of "bad faith" prevailing in the Seventh Circuit. The full text of the paragraph is as follows:

> Because the Court finds that the plaintiffs are prevailing parties against all defendants, it need not reach the issue of whether the intervenors litigated in bad faith. The Seventh Circuit has defined bad faith as conduct without "at least a colorable basis in law." Analytica, Inc. v. NPD Research, Inc., 708 F. 2d 1263, 1269 (7th Cir. 1983). Although as this court observed earlier, the intervenors did exhibit "recalcitrance" and precipitated "unneeded expenditure of time" in the case, their behavior does not appear to have reached the Seventh Circuit's definition of bad faith. Charles v. Carey, Slip. op. at p. 6.

Charles v. Daley, Memo. Op., April 22,

1985, at 4-5. (Emphasis supplied) Accordingly, the only basis for an award of attorneys' fees in this case is the finding that, in the district court and the court of appeals, the plaintiffs have prevailed against the appellants. Since a reversal of the lower court opinions will result in a reduction of the awarded amount of fees, this Court has jurisdiction to hear appellants' appeal from these adverse judgments.

CONCLUSION

For the reasons set forth above, and in the appellants opening brief, reply brief and prior supplemental brief, this Court possesses jurisdiction over this

appeal under Article III of the Constitution.

Respectfully submitted,

Dennis J. Horan
Edward R. Grant
*Maura K. Quinlan

AUL Legal Defense Fund
343 S. Dearborn St.
Room 1804
Chicago, Ill. 60604

Counsel for Appellants

*Counsel of Record

DATED: April 4, 1986